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Supreme Court
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No. 87-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NOBEL SCIENTIFIC INDUSTRIES, INC.,
Petitioner,

v.

BECKMAN INSTRUMENTS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN RESPONSE TO THE MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	i
SUPPLEMENTAL BRIEF OF RESPONDENT ..	1
Response To Brief	2
CONCLUSION	3

TABLE OF AUTHORITIES

Cases

	PAGE
Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985)	3
Fortner Enterprises, Inc. v. U.S. Steel Corp., 429 U.S. 610 (1977)	2
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	2

Rules

Rule 36, Supreme Court Rules	1

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SUPPLEMENTAL BRIEF OF RESPONDENT

The Respondent, Beckman Instruments, Inc. ("Beckman"), files this Supplemental Brief to respond to the Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Competitive Americas Project ("Project"). Beckman declined to consent to the filing of the Brief for lack of any demonstration of an amicus interest. Project fails to delineate any sufficient amicus interest in the matter either in the motion or the proposed brief, and fails to present any viewpoint but that of the Petitioner. The Court's disfavor (Rule 36, Supreme Court Rules) of such an "Amicus" Brief is fully warranted.

Response To Brief

Project, just as Petitioner, makes no mention of the lower Court's finding from the undisputed evidence that there was no tie-in as a matter of fact. "Here the evidence is undisputed that the items could be bought separately." (A. 25) The Courts below analyzed the purported evidence of forcing and found it to be nonexistent. (A. 25-28) Beckman's customers were free to acquire any system, reagent, service or supply separately. The Court expressly recognized that the failure to find a tie-in as a matter of fact, was wholly separate from the discussion of economic power. ("There is *also* no tying because there is no tying product with sufficient economic power. . . .") (A. 28)

Project's argument is premised on an erroneous theme, i.e., that the Courts below believed that *monopoly* power was required (Project Br. 2, 8, 10, 14, 15, 17) in order to establish a tying claim. (A. 31) To the contrary, the opinion quoted this Court's decision in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 429 U.S. 610 (1977) which stated:

> [T]hese decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. 429 U.S. at 620 (A. 31)

What the Courts in fact emphasized, consistent with this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) was the requirement for establishment and analysis of the tying and tied product markets. "In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold." 466 U.S. at 18. (A. 31) Since Nobel had failed to present legally sufficient evidence of such markets in which Beckman could exercise economic power, its claim foundered on this second ground, in addition to the lack of a tie-in.

The opinion of the Courts below correctly stated and applied the appropriate standards. It does not conflict with *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). (See Brief in Opposition, p. 8)

CONCLUSION

For the foregoing reasons, and those stated in the Brief in Opposition, this Court is respectfully requested to deny the Petition.

Respectfully submitted,

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